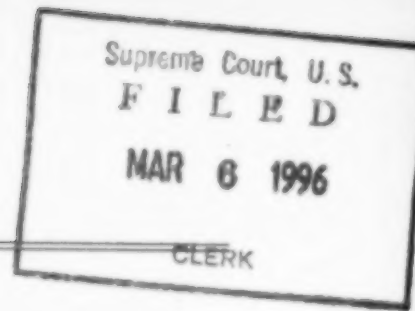


No. 95-1263



In The
Supreme Court of the United States
October Term, 1995

— ♦ —
CATERPILLAR, INC.,

Petitioner,

v.

JAMES DAVID LEWIS,

Respondent.

— ♦ —
On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

— ♦ —
BRIEF IN OPPOSITION

— ♦ —
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17 pp

QUESTIONS PRESENTED

1. Whether the alleged inconsistency between the circuits concerning the existence of subject matter jurisdiction in cases removed from state court merits the grant of writ of certiorari by this court.

2. Whether this court should grant certiorari so as to rule upon the question of derivative claims which are based upon state law.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iii
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	4
CONCLUSION	13

TABLE OF AUTHORITIES

	Page
<i>Able v. Upjohn Company</i> , 829 F. 2d 1330 (4th Cir., 1987), cert. denied, 485 U.S. 963 (1988).....	7
<i>American Fire & Casualty Company v. Finn</i> , 341 U.S. 6 (1951)	3, 5, 6, 8
<i>Chivas Products Limited v. Owen</i> , 864 F. 2d 1280 (1988)	6
<i>Gould, Inc. v. Pechiney Ugine Kuhlmann</i> , 853 F. 2d 445 (6th Cir., 1988)	6
<i>Greenshields v. Warren Trading Corporation</i> , 248 F. 2d 61 (10th Cir., 1957)	7
<i>Grubbs v. General Electric Corporation</i> , 405 U.S. 697, 92 S.Ct. 1344 (1972)	3, 5, 6, 8
<i>Higgins v. E.I. DuPont de Nemours & Company</i> , 863 F. 2d 1162 (4th Cir., 1988)	7
<i>Hillman v. American Mutual Liability Insurance Company</i> , 631 S.W. 2d 848 (KY 1982)	10
<i>Ingersoll-Rand Company v. Rice</i> , 775 S.W. 2d 924 (KY App. 1989)	11
<i>Mastin v. Liberal Markets</i> , 674 S.W. 2d 7 (KY 1984)	11
<i>Riggs v. Island Creek Coal Company</i> , 542 F. 2d 339 (1976)	6
STATUTES	
Kentucky Revised Statute 342.700	1, 4, 9
28 U.S.C. Section 1292(b) (1995)	8

STATEMENT OF THE CASE

This case is before this court upon the petition for writ of certiorari by Caterpillar, Inc. on the question of whether the Sixth Circuit was correct in its finding that subject matter did not exist in the district court and remanding this case to the state court for further proceedings.

This claim originally arose when the Plaintiff, James David Lewis, a Kentucky resident, filed a complaint in the Lawrence Circuit Court on June 22, 1989 against the Defendant, Whayne Supply, a Kentucky Corporation, and Caterpillar, Inc., a non-resident corporation. (Notice of Defendant, Caterpillar, Inc., of removal, 6/21/90, NR, 1). Subsequent to the filing of the complaint, Liberty Mutual Insurance Company intervened pursuant to Kentucky Revised Statute 342.700 in the name of James David Lewis and in its own name so as to protect its subrogation interest for workers' compensation benefits which had been paid to the Plaintiff, James David Lewis, on behalf of the Plaintiff's employer and Third-Party Defendant, Gene A. Wilson. (Notice of Defendant, Caterpillar, Inc., of removal, 6/21/90, NR. 1).

While this matter was still pending in the state court, the Plaintiff, James David Lewis, and the Defendant, Whayne Supply Company, entered into a partial settlement whereby the Plaintiff settled a portion of his claims against Whayne Supply Company, with the exception of any claims which the Plaintiff might have against the Defendant, Whayne Supply Company, for the amounts paid to the Plaintiff by the insurance carrier, Liberty Mutual Insurance Company, for workers' compensation

benefits. No papers were filed in the Lawrence Circuit Court concerning the settlement of this action until August 2, 1990. (Memorandum Opinion and Order, 9/24/90, NR 13, p. 3).

The Defendant, Caterpillar, Inc., then filed a Notice of Removal of this action to the United States District Court for the Eastern District of Kentucky, Ashland, Kentucky. (Notice of Defendant, Caterpillar, Inc., of removal, 6/21/90, NR 1). A timely objection was filed by the Plaintiff to the Notice of Removal and the Plaintiff subsequently filed a timely Motion to Remand. (Objection of Plaintiff to Notice of Removal, 6/29/90, NR. 3; Motion of Plaintiff to Remand to Lawrence Circuit Court, 8/2/90, NR. 6).

After judgment was entered in the District Court in favor of the Defendant, Caterpillar, Inc., the Plaintiff, James David Lewis, appealed this action to the U.S. Court of Appeals for the Sixth Circuit. On October 11, 1995 the Court of Appeals for the Sixth Circuit entered its opinion finding that as Whayne Supply Company, a Kentucky corporation, and James David Lewis, a Kentucky resident, remained as opposing parties, there was not complete diversity of citizenship and therefore subject matter jurisdiction did not exist. Therefore, the Sixth Circuit held that the district court erred in denying the Plaintiff's motion to remand this case to the state court for lack of subject matter jurisdiction because complete diversity did not exist at the time this case was removed from state court.

SUMMARY OF THE ARGUMENT

The initial question raised in the Petitioner's Petition for Writ of Certiorari is when subject matter jurisdiction is determined in the federal courts and whether subject matter jurisdiction is waived where a party, although filing a timely motion to remand and objection to removal, does not file a request for an interlocutory appeal. The question as set out by this court in *Grubbs v. General Electric Corporation*, 405 U.S. 697, 92 S.Ct. 1344 (1972) is whether a case is tried on the merits without objection to the question of subject matter jurisdiction. In the matter at bar, as objection was made by the filing of a timely Objection to Notice of Removal and the filing of a Motion to Remand, subject matter jurisdiction was not waived.

The Petitioner argues that the Plaintiff waived his objection to subject matter jurisdiction by not requesting leave to file an interlocutory appeal. However, this court has stated that existence of federal jurisdiction may be questioned at any point in the course of litigation and parties cannot waive the requirement of subject matter jurisdiction. *American Fire & Casualty Company v. Finn*, 341 U.S. 6 (1951).

The Respondent would submit that this court has already properly addressed the question of when subject matter jurisdiction is present and has adequately addressed the question of waiver of subject matter jurisdiction. Accordingly, the Respondent would submit that this case is not one which would merit the granting of a writ of certiorari by this court.

The Petitioner also raises the question of how the federal courts should deal with the question of derivative

claims. In the matter at bar, the derivative claims of the insurance carrier, Liberty Mutual Insurance Company, are claims which are determined by Kentucky law.

Under Kentucky Revised Statute 342.700—an insurance carrier has the right to file for its subrogation interest in the name of the Plaintiff. In the matter at bar, Liberty Mutual Insurance Company filed its claim for subrogation interest in the name of the Plaintiff, James David Lewis. Thus, under Kentucky law, James David Lewis was the Plaintiff seeking recovery of the subrogation interest of Liberty Mutual.

As noted, this was an alleged diversity action which was removed to federal court and practiced under state law. As the rights of the insurance carrier in this matter and therefore the derivative claims are determined by Kentucky law, the Respondent would submit that it would not be appropriate for this court to grant a writ of certiorari so as to review the applicability of Kentucky law to subrogation claims.

ARGUMENT

THE ALLEGED INCONSISTENCY BETWEEN THE CIRCUITS CONCERNING THE EXISTENCE OF SUBJECT MATTER JURISDICTION IN CASES REMOVED FROM STATE COURT DOES NOT MERIT THE GRANT OF A WRIT OF CERTIORARI BY THIS COURT.

Caterpillar, Inc. attempts to argue that as Wayne Supply settled its potential liability to Liberty Mutual Insurance Company after the removal of this case to

federal district court and therefore the Plaintiff and the Defendant were diverse at the time of trial, that subject matter jurisdiction did exist. While the Defendant, Caterpillar, Inc., has cited various cases in its attempt to support this position the Defendant has ignored a very important part of this test.

The rule as stated in *Grubbs v. General Electric Corporation*, 405 U.S. 697, 92 S.Ct. 1344, 1347 (1972), is

"Longstanding decisions of this court make clear, however, that where after removal a case is tried on the merits *without objection* and the federal court enters judgment, the issue in subsequent proceedings on appeal is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court." (Emphasis added).

The defining point in the rule is that the case must have been removed without objection. In the matter at bar, such is not present. As previously noted, the Plaintiff filed an objection to the Notice of Removal and a Motion to Remand. Therefore, this case does not fit into the rule as argued by the Defendant, Caterpillar, Inc.

As stated by the United States Supreme Court, the jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation or by prior action or consent of the parties. *American Fire & Casualty Company v. Finn*, 341 U.S. 6, 17-18 (1951). While the Defendant, Caterpillar, Inc., has argued that the Plaintiff waived his objection to subject matter jurisdiction by not filing an interlocutory appeal, "existence of federal jurisdiction may be questioned at any point in the course of

litigation and parties cannot waive the requirement of subject matter jurisdiction." *American Fire & Casualty Company v. Finn*, 341 U.S. 6, 17-18 (1951).

"When subject matter jurisdiction is predicated upon the diversity of the parties, citizenship of the parties is determined at the time the action is commenced." *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F. 2d 445, 450 (6th Cir., 1988) (emphasis added). As noted by this court, at the time of the attempt to remove this case to the United States District Court, subject matter jurisdiction did not exist as there were non-diverse parties, namely, James David Lewis, a Kentucky resident, and Whayne Supply Company, a Kentucky corporation.

The rule in the Sixth Circuit as well as the rule enunciated by the United States Supreme Court is that where a party objects to removal based upon a lack of subject matter jurisdiction, then the opposing party has not waived the requirement of subject matter jurisdiction and the court will not accept jurisdiction where there is a lack of subject matter jurisdiction. In *Grubbs v. General Electric Corporation*, 405 U.S. 697 (1972), *American Fire & Casualty Corporation*, 341 U.S. 6 (1951), *Chivas Products Limited v Owen*, 864 F. 2d 1280 (1988), and *Riggs v. Island Creek Coal Company*, 542 F. 2d 339 (1976) no objection to subject matter jurisdiction was made.

Therefore, these cases are easily distinguishable on their face from the current action, as in the current action, the Plaintiff, James David Lewis, filed an objection to the Notice of Removal and also filed a Motion to Remand. Accordingly, as objection was made by the Plaintiff to the attempt to remove this claim to United States District

Court, this claim does not fit into the rule as cited by the Defendant. Therefore, subject matter jurisdiction was not waived by the Plaintiff, James David Lewis, and it was not appropriate for the district court to retain jurisdiction. Therefore, the decision of this court should be affirmed.

Caterpillar, Inc. argues that there is an acknowledged conflict among the circuits, as Caterpillar argues that the Fourth and Ninth Circuits require a party to file an interlocutory appeal from the denial of the Motion to Remand. However, a review of the cases cited by Caterpillar, Inc. indicate that the main thrust of decisions of the Fourth and Ninth Circuits is whether an objection was timely made to the removal, not merely whether an interlocutory appeal was filed.

In *Higgins v. E.I. DuPont de Nemours & Company*, 863 F. 2d 1162 (4th Cir., 1988) the Fourth Circuit found that the Plaintiffs did not object to removal at the time of said removal and only raised an objection subsequent to the district court's adverse rulings on the merits. The Fourth Circuit in *Higgins* stated that diversity must be established at the time of removal. In commenting on the Plaintiff's failure to object to the propriety of removal, the court stated that the failure to object to the propriety of removal in the first place seems more egregious than the failure to file an interlocutory appeal by the Plaintiff in *Able v. Upjohn Company*, 829 F. 2d 1330 (4th Cir., 1987), cert. denied, 485 U.S. 963 (1988).

In *Able*, the Fourth Circuit quoted the Tenth Circuit's decision in *Greenshields v. Warren Trading Corporation*, 248 F. 2d 61 (10th Cir., 1957), stating that the congressional desire to restrict removal has been understood to require

that doubts about the propriety of removal should be resolved in favor of retained state court jurisdiction.

While Caterpillar, Inc. argues that this court should grant certiorari so as to address this supposed conflict between the circuits, the Respondent, James David Lewis, would submit that this court has already adequately considered this issue. In both *Grubbs* and *American Fire & Casualty Company*, this court held that where a party objects to removal based upon a lack of subject matter jurisdiction, then said party has not waived the requirement of subject matter jurisdiction and the court will not accept jurisdiction where there is such a lack of subject matter jurisdiction. Accordingly, upon this ground, the Petition for Writ of Certiorari should be denied.

The Respondent would further point out that 28 U.S.C. Section 1292(b) (1995) states that when a district judge is of the opinion that there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the district judge shall so state in writing in such order. The Respondent would point out that no such statement was made by the district judge in his orders overruling the motion to remand and objection to removal from state court. Thus, the Respondent would submit that a request for interlocutory appeal would have been inappropriate and would therefore mandate against this court granting the Petition for Writ of Certiorari.

AS THE SUBROGATION CLAIMS OF THE INSURANCE CARRIER, LIBERTY MUTUAL INSURANCE COMPANY, WERE RAISED IN THE NAME OF THE PLAINTIFF, JAMES DAVID LEWIS, PURSUANT TO KENTUCKY LAW, THERE REMAINED NON-DIVERSE PARTIES ON EITHER SIDE OF THE ACTION IN FEDERAL COURT AND THEREFORE SUBJECT MATTER JURISDICTION DID NOT EXIST.

The Defendant, Caterpillar, Inc., argues that the claims of Liberty Mutual against Wayne Supply Company did not survive the settlement between James David Lewis and Wayne Supply Company and Wayne Supply Company was therefore not a proper party to this action when this matter was removed from federal court. However, the argument of the Defendant, Caterpillar, Inc., ignores the applicable law and the entire history of this case.

This case was practiced under Kentucky law and was removed to the district court under alleged diversity jurisdiction. KRS 342.700 provides:

"(1) . . . If compensation is awarded under this chapter, the employer, its insurance carrier, the Special Fund, and the Uninsured Employers' Fund, or any of them, having paid the compensation or having become liable therefore, may recover in his or its own name or that of the injured employee from the other person in whom legal liability for damages exists, not to exceed the indemnity paid and payable to the injured employee, less the employee's legal fees and expenses."

In accord with this statute, Liberty Mutual Insurance Company intervened in the name of the Kentucky resident, James David Lewis, and in its own name. Thus, non-diverse parties remained in this action while this claim was in the federal court, as James David Lewis is and was a Kentucky resident and Whayne Supply Company is a Kentucky corporation.

The Defendant, Caterpillar, Inc., would have this court ignore the complete history of this case in arriving at a conclusion that Whayne Supply Company should not have been involved in this case while this matter was pending in federal court. During the course of this action in federal court, claims of Liberty Mutual which were filed in the name of the Plaintiff, James David Lewis, continued to be litigated. This is reflected by the court's order of December 3, 1991 in which the court granted the motion of Liberty Mutual to amend the complaint so as to add a negligence claim on behalf of the Plaintiff, James David Lewis, against Whayne Supply Company. (Order, 12/31/91, NR 57).

The Defendant, Caterpillar, Inc., cites various Kentucky cases in its attempt to show that any claims of Liberty Mutual against Whayne Supply were extinguished when the partial settlement was entered into between the Plaintiff and Whayne Supply Company. However, these cases are easily distinguishable on their face and a reading of the complete case reflects that these cases do not stand for the point for which the Defendant, Caterpillar, Inc., attempts to argue.

In *Hillman v. American Mutual Liability Insurance Company*, 631 S.W. 2d 848 (KY 1982) the court addressed the

question of pro rata recovery between the insurance carrier and the Plaintiff where the third-party insurance coverage was not sufficient so as to cover the entire loss of the Plaintiff. The court held that the carrier was only subrogated to the portion of the judgment which was covered by workers' compensation benefits, that is, medical expenses and lost wages.

Ingersoll-Rand Company v. Rice, 775 S.W. 2d 924 (KY App, 1989) stands for the legal point that an insurance carrier is still entitled to subrogation regardless of the negligence of the employer. *Mastin v. Liberal Markets*, 674 S.W. 2d 7 (KY 1984) stands for the legal point that an insurance carrier is entitled to subrogation from a settlement with one defendant even where non-settling defendants remain. However, there was no question in *Mastin* concerning a situation which we have here, where the subrogation rights of Liberty Mutual Insurance Company were specifically reserved in the settlement agreement.

As reflected by the complete history of this case, Whayne Supply did remain a viable defendant upon removal of this case to the federal court and, as Whayne Supply was a Kentucky corporation, the claims of James David Lewis survived the settlement with Whayne Supply in state court and the claims of Liberty Mutual Insurance Company which were filed in the name of James David Lewis resulted in diversity not existing at the time of removal.

In the matter at bar, the question of the rights of a derivative party are governed by the applicable Kentucky law. As previously noted, under Kentucky law, an insurance carrier has the right to either file in its own name or

in the name of the Plaintiff. In the matter at bar, the insurance company chose to file in the name of the Plaintiff, James David Lewis.

As such claims were filed in the name of the Plaintiff, James David Lewis, and as the subrogation interests of the insurance carrier were not settled by James David Lewis in the state court action, these claims survived said settlement and the Plaintiff, James David Lewis, therefore retained certain claims against the Defendant, Wayne Supply Company, a Kentucky corporation, for amounts paid by Liberty Mutual Insurance Company pursuant to its policy of workers' compensation benefits.

The Sixth Circuit's ruling applies the appropriate Kentucky law and recognizes that under Kentucky law, James David Lewis, a Kentucky resident, retained certain viable claims against Wayne Supply Company, a Kentucky Corporation, when this matter was removed to federal court.

Caterpillar, Inc. attempts to argue that Wayne Supply Company was an unnecessary and dispensable party to the litigation and its presence should not be considered in ascertaining whether diversity jurisdiction existed. However, as previously noted, a review of this case indicates otherwise. Wayne Supply Company was an active party in the litigation after this matter was removed to federal court. Wayne Supply Company paid out over \$600,000.00 in the state court action and the federal court action so as to settle the claims brought against Wayne Supply Company by the Plaintiff, James David Lewis. Thus, Wayne Supply Company was clearly not a unnecessary and dispensable party to this action.

The question of the survival of derivative claims in this matter is a question based upon Kentucky law. Accordingly, the Respondent, James David Lewis, would submit that such does not provide an appropriate basis for this court to grant a writ of certiorari. Accordingly, the Respondent would respectfully request that the Petition for Writ of Certiorari be denied.

CONCLUSION

The arguments of the Petitioner do not raise a conflict so substantial between the circuits so as to require this court to grant certiorari so as to resolve such. As the question concerning derivative claims is based upon Kentucky law, the Petitioner has not raised a sufficient basis upon which this court should grant certiorari so as to review such.

Respectfully submitted,

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